IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

DANIEL ISAAC — Petitioner

v. — Civil Action No. 1:97cv353

SHERRY BENNETT RICE — Respondent

MEMORANDUM OPINION

Presently before the court is the "Petition for the Return of Child to the Petitioner." After carefully considering the petition, the submissions of the parties, and the hearing evidence gathered in this action, the court finds that the petition should be denied.

I. Findings of Fact

Benjamin Isaac is fifteen years old. His natural parents are the Petitioner Daniel Isaac and the Respondent Sherry Rice. Sherry gave birth to Benjamin on April 17, 1983. Daniel and Sherry divorced on February 28, 1986, by decree of the Superior Court of California, County of San Bernardino, Central District. In the decree, Daniel and Sherry were awarded joint legal custody of Benjamin, Daniel was awarded sole physical custody of Benjamin, and Sherry was awarded reasonable visitation rights.

Sometime in April of 1986, Daniel traveled to Israel. With him Daniel took Benjamin, as well as Elisheva Kara Isaac, who is Daniel and Sherry's other child born March 4, 1981. Daniel did not take the children to Israel with Sherry's consent. Indeed, he did so without Sherry's knowledge. Sherry discovered the children were missing sometime later, and for the next eleven years she searched unsuccessfully for them with the assistance of the Federal Bureau of Investigation.

On or about February 28, 1997, Daniel's mother visited Sherry in Iuka, Mississippi, where Sherry had moved and now resides with her new husband Frank Rice. Daniel's mother informed Sherry that Benjamin and Elisheva were living with Daniel in Israel. Daniel's mother arranged for Sherry to speak with her children by telephone. Thereafter, Sherry and Benjamin talked by telephone almost daily for approximately two months.

In late April or early May of 1997, Sherry visited Israel. Upon her arrival there, Sherry asked Benjamin over the telephone if he wished to move to the United States with her. Benjamin told her that he did, and he took a taxi to her hotel. Sherry took Benjamin to the United States embassy in Israel to obtain a passport for Benjamin and then flew her son to the United States. Now Sherry provides a home for Benjamin in Iuka, Mississippi. Since arriving in the United States, Benjamin has successfully completed the eighth grade at Iuka Middle School.

On October 31, 1997, Daniel filed a petition in this court entitled "Petition for the Return of Child to the Petitioner." On November 5, 1997, the court conducted a hearing regarding the temporary location of Benjamin pending a final adjudication of the petition. Following that hearing, the court held that Benjamin shall be allowed to stay home with Sherry until such final adjudication. On July 23, 1998, the court conducted another hearing, this time on the merits of the "Petition for the Return of Child to the Petitioner."

II. Conclusions of Law

Daniel has petitioned the court for the return of Benjamin to Israel pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,494 (1986) (hereinafter "the Convention"), as implemented in the United States by the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610 (1994), (hereinafter "the Act"). The object

of the Convention is "to secure the prompt return of children *wrongfully removed* to or retained in any Contracting State; and to ensure that rights of custody and of access under the law of one Contracting States are effectively respected in the other Contracting States." The Convention, art 1 (emphasis added).

> The removal or the retention of a child is to be considered wrongful where –
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was *habitually resident* immediately before the removal or retention; and
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The Convention, art. 3 (emphasis added). "No definition of 'habitual residence' has ever been included in a Hague Convention. This has been a matter of deliberate policy, the aim being to leave the notion free from technical rules, which can produce rigidity and inconsistencies as between legal systems." Walton v. Walton, 925 F. Supp. 453, 457 (S.D. Miss. 1996) (quoting Re Bates, No. CA122.89 at 9-10, High Court of Justice, Fam. Div'n Ct. Royal Court of Justice, United Kingdom (1989)). However, the Sixth Circuit has provided an oft-quoted discussion of "habitual residence," as follows:

> The Convention does not define "habitual residence." . . . The British courts have provided the most complete analysis. In Re Bates, the High Court of Justice [of the United Kingdom] concluded that there is no real distinction between ordinary residence and habitual residence. Id. at 10. The court also added a word of caution:
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> > It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions.
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> Id. (quoting Dicey & Morris, The Conflicts of Laws 166 (11th ed.)). We agree that habitual residence must not be confused with domicile. To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions.

Friedrich v. Friedrich, 983 F.2d 1396, 1400-01 (6th Cir. 1993) (citations partially omitted). Important to the case at bar, the Sixth Circuit added that "habitual residence can be 'altered' only by a change in geography and the passage of time, not by changes in parental affection and responsibility. The change in geography must occur before [a] questionable removal . . . ." Id. at 1402.

Following the Sixth Circuit in Friedrich, as well as the High Court of Justice of the United Kingdom in Re Bates, the Third Circuit analyzed the phrase "habitual residence" as follows:

> [A] child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective. We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place *and the parents' present, shared intentions regarding their child's presence there*.
>
> When we apply our definition of habitual residence to the facts, we conclude that Australia was [the child]'s habitual residence immediately prior to his retention in the United States by [his mother] Mrs. Feder. [The child] moved, with his mother and father, from Pennsylvania to Australia where he was to live for at the very least the foreseeable future, and stayed in Australia for close to six months, a significant period of time for a four-year old child. In Australia, [the child] attended preschool and was enrolled in kindergarten for the upcoming year, participating in one of the most central activities in a child's life. Although Mr. and Mrs. Feder viewed Australia very differently, both agreed to move to that country and live there with one another and their son, and did what parents intent on making a new home for themselves and their child do-- they purchased and renovated a house, pursued interests and employment, and arranged for [the child]'s immediate and long-term schooling. That Mrs. Feder did not intend to remain in Australia permanently and believed that she would leave if her marriage did not improve does not void the couple's settled purpose to live as a family in the place where Mr. Feder had found work.
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> We thus disagree with the district court's conclusion that the United States, not Australia, was [the child]'s habitual residence . . . .

Feder v. Evans-Feder, 63 F.2d 217, 224 (3rd Cir. 1995) (emphasis added).

These cases indicate that a court analyzing whether a country is a child's habitual

residence should consider *inter alia* the shared intentions of the parents regarding the child's presence in that country. See also Zucker v. Andrews, Civil Action No. 97-12099-RCL, 1998 WL 169506, at *4 (D. Mass. April 10, 1998) (considering point of view of child and "shared intentions of the parents"). Here, Danial and Sherry did not share intentions regarding Benjamin's presence in Israel. Daniel moved Benjamin to Israel in 1986 without Sherry's knowledge or consent. At no point during the years Benjamin lived in Israel did Sherry intend for him to live there. In fact, Sherry did not even know Benjamin was living in Israel until 1997.

This court finds that it would render the Convention meaningless to determine that Daniel altered Benjamin's habitual residence by removing him from California in 1986 without Sherry's knowledge or consent. As the Sixth Circuit explained in Friedrich, such a determination "would be an open invitation for all parents who abduct their children to characterize their wrongful removals as alterations of habitual residence." Friedrich, 983 F.2d at 1402 ("If we were to determine that by removing Thomas from his habitual residence without Mr. Friedrich's knowledge or consent Mrs. Friedrich 'altered' Thomas's habitual residence, we would render the Convention meaningless."). To be sure, Benjamin did live in Israel approximately eleven years, which is a long time easily sufficient for "acclimatization and . . . a degree of settled purpose from the child's perspective." See Feder, 63 F.2d at 224. However, it would be a technical and restrictive reading of the "habitual residence" requirement for a court always to look solely at a child's perspective regarding a country, much less the number of years the child spends in that country, in determining the child's habitual residence, especially where one of the parents carried the child to that country without the other parent's knowledge or consent. See Zucker at *2 ("Courts should not interpret the term technically or restrictively.") (citing Rydder v. Rydder, 49

F.3d 369, 373 (8th Cir. 1995)). In sum, the Petitioner has failed to prove that Israel is Benjamin's habitual residence. Therefore, the court shall deny the "Petition for the Return of Child to the Petitioner."

Even if the Petitioner could meet his burden of proof regarding the child's habitual residence, this court finds that the Respondent has successfully proved an exception under the Convention. The Convention provides in pertinent part, "The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." The Convention, art. 13; see also 42 U.S.C. § 11603(e)(2) (providing exception must be proved by preponderance of evidence). Of course, in less than nine months, Benjamin will turn sixteen, at which time the Convention no longer applies to him. See the Convention, art. 4. Therefore, the court notes that the effect of the exception is to avoid unsettling Benjamin during these remaining nine months. The court also notes that when Benjamin stated his views in chambers to the court, he did not "reject" his father. Benjamin even told Dr. Collin Billingsley, a child psychologist who testified at the hearing on July 23, 1998, that Benjamin is not "rejecting" his father by choosing not to return to Israel right now. Benjamin simply chooses not to return to Israel as the petition proposes because he wants to get to know the members of his family in the United States better. Benjamin further favors living in a family environment with his mother and stepfather in the United States rather than in the boarding school he attended in Israel. Considering Benjamin's age and the testimony of Dr. Billingsley, who stated that Benjamin has advanced cognitive maturity and the social maturity expected of a boy his age, the court finds that Benjamin is an intelligent, thoughtful boy who is of sufficient age and maturity for the court to

take account of his views. The court further finds that there is no evidence that anyone coerced him to state those views. Therefore, the court shall not order the return of Benjamin to Israel during the nine months Benjamin is still subject to the Convention.

III. Conclusion

The court shall deny the petition. The Petitioner failed to prove that Israel is the child's habitual residence. Also, an exception to the Convention applies.

A separate order in accordance with this opinion shall issue this day.

This the ____ day of July 1998.

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United States District Judge

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ORDER DENYING PETITION

Pursuant to a memorandum opinion issued this day, the court denies the "Petition for the Return of Child to the Petitioner."

THEREFORE, it is hereby ORDERED that:

(1) the "Petition for the Return of Child to the Petitioner" is DENIED;

(2) the property bond executed by the Respondent and Frank Rice in the amount of $10,000 is RELEASED; and

(3) this case is CLOSED.

All memoranda and other materials considered by the court in ruling on this petition are hereby incorporated into and made a part of the record in this action.

SO ORDERED, this the ____ day of July 1998.

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United States District Judge